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No. 98-9537

IN THE SUPREME COURT OF THE UNITED STATES

JUATASSA SIMS, PETITIONER

v.

KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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SUPREME COURT, U.S.

QUESTION PRESENTED

Whether the court of appeals properly declined to consider issues that petitioner failed to raise before the Social Security Administration.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-2) and of the district court (Pet. App. 3) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1998. A petition for rehearing was denied on February 18, 1999 (Pet. App. 36). The petition for a writ of certiorari was filed on May 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Social Security Act provides for the payment of monthly benefits to disabled persons who have contributed to the program. 42 U.S.C. 401-433.[1] The initial disability determination is made by a state agency, acting under the authority of the Commissioner of Social Security. 42 U.S.C. 421(a). If the state agency has denied the disability claim after an initial decision and a de novo reconsideration, the claimant is entitled to a hearing before an administrative law judge (ALJ). 42 U.S.C. 405(b); 20 C.F.R. 404.944-404.961. The claimant may appeal an adverse decision by an ALJ to the Appeals Council within the Social Security Administration (SSA). 20 C.F.R. 404.967-404.982. After a claimant has exhausted those administrative procedures, he may seek judicial review in federal court. 42 U.S.C. 405(g) and (h). See Bowen v. Yuckert, 482 U.S. 137, 142 (1987); Bowen v. City of New York, 476 U.S. 467, 482 (1986); Mathews v. Eldridge, 424 U.S. 319, 330 (1976); Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

2. Petitioner is a claimant who was denied Social Security disability benefits. After the state agency denied her claim, petitioner requested a hearing before an ALJ, who determined that

[1] Title XVI of the Act provides for the payment of disability benefits to certain indigent persons under the Supplemental Security Income Program. 42 U.S.C. 1382.

petitioner was not disabled under the Act. Pet. App. 26. The Appeals Council found that there was no basis for review of the ALJ's decision. Id. at 34. Petitioner was represented by counsel before the ALJ and the Appeals Council. Id. at 17, 35.

3. The district court affirmed, adopting as its opinion the report and recommendation of the United States Magistrate. Pet. App. 5-6. The court found that the ALJ properly declined to credit the report of petitioner's psychologist, Dr. Morris, because his findings were "controverted by other evidence." Id. at 10. The court then addressed and rejected several other arguments that petitioner failed to present to the ALJ. Ibid.[2]

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-2. The court found petitioner's contention that the ALJ failed to accord proper weight to Dr. Morris' opinion "without merit because the ALJ is entitled and expected to determine the credibility of medical experts and to weigh their opinions accordingly." Id. at 2. The court further found that it "lack[ed] jurisdiction" to review petitioner's remaining

[2] The court rejected petitioner's contentions that the ALJ selectively ignored the evidence (Pet. App. 10); that the ALJ improperly failed to order a consultative examination under 20 C.F.R. 404.1519 (Pet. App. 11); and that the ALJ erred in not asking the vocational expert a hypothetical question as to the type of jobs petitioner could perform in light of the impairments found by the ALJ (Pet. App. 12).

contentions because "they were not raised before the Appeals Council." Ibid. The court therefore did not consider petitioner's contentions that the ALJ improperly excluded certain of her impairments in assessing her residual function capacity and that the ALJ should have ordered a consultative examination to assess her mental impairment. Ibid.

ARGUMENT

Petitioner argues (Pet. 7-16) that the court of appeals' refusal to consider the contentions that petitioner failed to raise before the Appeals Council conflicts with the Social Security Act and the informal nature of disability determinations. That contention, however, is incorrect and does not warrant this Court's review.

1. It is well-settled that a party's failure to raise an issue that he or she had an opportunity to present to an administrative agency ordinarily bars the party from raising the issue for the first time upon appeal of the administrative decision. See, e.g., Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 155 (1946). Sound reasons support the principle that a party must raise an issue in an administrative proceeding in order to preserve the issue on judicial review. "[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the

opportunity for correction in order to raise issues reviewable by the courts." United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952); accord Aragon, 329 U.S. at 155 ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").[3]

Petitioner argues (Pet. 8, 11-14) that the above principle is inconsistent with the informal and nonadversarial nature of a disability determination by the SSA. However, "[t]he same principles which guide [other cases involving judicial review of administrative action] – agency autonomy and expertise, efficient judicial review and promoting judicial economy – apply to social security administration appeals." Fernandez v. Apfel, No. 97 Civ. 6936 1998 WL 603151, at *16 (S.D. N.Y. Sept. 11, 1998); see also James v. Chater, 96 F.3d 1341, 1344 (10th Cir. 1996) ("[T]his kind

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[3] Although the court of appeals (Pet. App. 2) stated that it lacked "jurisdiction" to review issues not raised before the agency, the doctrine is one of judicial practice and does not involve a matter of appellate jurisdiction in the technical sense. See Hormel v. Helvering, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the * * * administrative agency below.").

of request for administrative review, which does not identify the issues with any particularity, effectively sandbags the Appeals Council" and "thereby deprive[s] [the court] of its informed views on those issues"). The court of appeals therefore correctly declined to review the contentions that petitioner failed to raise before the Appeals Council. Pet. App. 1-2.

2. Petitioner contends (Pet. 7, 14-15) that the decision below conflicts with this Court's decision in Darby v. Cisneros, 509 U.S. 137 (1993). That is not correct. The Court in Darby held that a claimant seeking judicial review under Section 10 of Administrative Procedure Act (APA), 5 U.S.C. 702 et seq., must first exhaust his administrative remedies only when "mandated either by statute or by agency rule." 509 U.S. at 147. Here, the Social Security Act explicitly requires the exhaustion of administrative remedies. 42 U.S.C. 405(g) and (h); see Bowen v. Yuckert, 482 U.S. 137, 142 (1987); Bowen v. City of New York, 476 U.S. 467, 482 (1986); Califano v. Sanders, 430 U.S. 99, 103 n.3 (1977); Mathews v. Eldridge, 424 U.S. 319, 330 (1976); Weinberger v. Salfi, 422 U.S. 749, 765 (1975).

Petitioner asserts (Pet. 9-11, 15) that neither the Social Security Act nor the Commissioner's implementing regulations require a claimant to raise an issue before the agency in order to preserve the issue for judicial review. Specifically, petitioner

argues that because the Act and regulations require a claimant to raise an issue before the agency in certain instances, see 42 U.S.C. 405(g) (limiting judicial review when claimant fails to "submit proof in conformity" with a regulation) and 20 C.F.R. 404.940 (requiring claimant to notify ALJ of an objection to particular ALJ on grounds of bias "at your earliest opportunity"), the claimant is not required to preserve an issue before the agency in any other instance. Nothing in Section 405(g) or the regulations, however, suggests that a court should depart from the usual practice in administrative law by considering a matter not presented to the agency in the first instance. Cf. Darby, 509 U.S. at 153-154 ("the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA").

The prudential requirement that a litigant must have raised a matter before the Appeals Council in order to raise it in court is similar to than this Court's general practice of not reviewing an issue not raised in or passed upon by the lower courts. See, e.g., Youakim v. Miller, 425 U.S. 231, 234 (1976). It is entirely consistent with that requirement for the Appeals Council itself to consider any issue it deems relevant to the matter before it, whether or not the matter was raised by a party. See Kolstad v. American Dental Ass'n, 119 S. Ct. 2118, 2127 (1999) ("The Court has not always confined itself to the set of issues addressed by the

parties."). Accordingly, the fact that the Appeals Council, if it reviews a case, may decide to consider issues not raised by the claimant, does not suggest that a court may do so. Specification of issues to the Appeals Council facilitates the performance of its role in the administrative process by enabling it to identify cases of possible error, and therefore to correct those errors before the case goes to court. See Weinberger v. Salfi, 422 U.S. 749, 765-766 (1975). If a claimant fails to raise an issue with the Appeals Council, but then presents it for the first time in court, that purpose of the exhaustion requirement is undermined.

3. Petitioner also argues (Pet. 8-9, 13) that a rule requiring claimants to present their contentions to the Appeals Council raises due process concerns, especially in cases where the claimant is not represented by an attorney or is not advised of the rule by the agency. This case, however, does not raise any such issue, because petitioner was represented by counsel before the ALJ and the Appeals Council. See Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999) (claimant's "fairness argument might be more persuasive if [claimant] had not been represented by counsel"). Indeed, petitioner's counsel submitted to the Appeals Council a 12 page single-spaced letter specifying petitioner's objections to the ALJ's decision. Admin. Rec. 164-176.

Moreover, at the time petitioner, through counsel, appealed her disability determination to the ALJ and the Appeals Council, the rule requiring claimants to present their contentions to the agency in order to preserve them for judicial review was well-settled in the Fifth Circuit as well as other courts of appeals. Pet. App. 2 n.1; see also p. 10, infra. Petitioner therefore cannot credibly contend that her due process rights were violated because she lacked notice of the rule -- even if we assume, arguendo, that some sort of notice were required in those circumstances, especially where the claimant is represented by counsel.

Apart from lack of any unfairness in this case, this Court's review of petitioner's due process contentions is not warranted for another reason as well. We have been informed by the SSA that, in any case in which the claimant was not represented during the administrative process, SSA as a matter of policy ordinarily does not argue that the claimant is barred from making arguments on judicial review that he failed to preserve in support of the claim that he presented in the administrative proceedings. See Supp. Pet. App. C2. Thus, the instances in which a court will find that an unrepresented claimant has waived legal issues not raised before the agency is not likely to occur with any significant frequency.

4. At the time the court of appeals issued its decision in this case, the other courts of appeals that had considered the question had also concluded that a claimant may forfeit the right to raise issues on appeal if he did not raise them before the Appeals Council. See, e.g., Krafsur v. Secretary of Health & Human Services, 757 F.2d 446, 447 (1st Cir. 1985); Krysztoforski v. Chater, 55 F.3d 857, 860 (3d Cir. 1995); Harper v. Secretary of Health & Human Services, 978 F.2d 260, 265 (6th Cir. 1992); Pope v. Shalala, 998 F.2d 473, 480 n.6 (7th Cir. 1993); Johnson v. Chater, 108 F.3d 942, 945-946 (8th Cir. 1997); Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999); James v. Chater, 96 F.3d at 1343-1344.[4]

After the decision below was rendered, however, two courts of appeals issued decisions concluding that a claimant will not be held to have waived issues that were not presented to the Appeals Council. Harwood v. Apfel, 1999 WL 608649, at *2-*3 (8th Cir. 1999); Johnson v. Apfel, 1999 WL 675368 (7th Cir. 1999); see Supp. Pet. 1-3 and Supp. Pet. App. A and B. The Eighth Circuit in Harwood reasoned that the Appeals Council "routinely considers arguments not specifically raised by claimants before it" and that claimants are given "no advance notice that issues not specifically

[4] The Fourth Circuit has reached the same result in unpublished dispositions. See, e.g., Cline v. Chater, No. 95-2076, 1996 WL 189021, at **4 (April 19, 1996); Clagg v. Chater, No.94-2302, 1995 WL 679841, at **1 (Nov. 16, 1995).

raised will be forfeited." 1999 WL 608649 at *2.[5] The Eighth Circuit explained that the SSA form through which claimants appeal an adverse ALJ decision "provides a three-line space for claimants to articulate the grounds for appeal -- and no warning of the waiver rule." Ibid. Similarly, the Seventh Circuit in Johnson overruled its prior precedent (see, e.g. Pope v. Shalala, supra) and held that a claimant need not raise all contested issues before the agency, because the Secretary's regulations and forms do not require the claimant to present contested issues to the Appeals Council. 1999 WL 675368, at *2.

Although the decisions in Harwood and Johnson are in conflict with the decision below and the decisions of other courts of appeals, there is no occasion at this time for the Court to consider the question whether a claimant seeking social security benefits must raise an issue at the administrative level in order to preserve the issue for appeal. The SSA has informed us that it intends to amend the form that claimants and their representatives must file with the SSA in order for the agency to recognize someone other than the claimant as acting on the claimant's behalf in matters before the agency. See 20 C.F.R. 404.1707, 410.684, and

[5] As we have explained above, the fact that the Appeals Council, under existing regulations, may chose to consider issues not raised by a claimant does not mean that a court may do so.

416.1507. That form in the future will advise the claimant's representative that the failure to present an issue to the Appeals Council may preclude the claimant from raising the issue upon judicial review of the agency's decision. That notice not only responds to the concerns expressed by the Seventh and Eighth Circuits about lack of notice, but also reflects SSA's judgment, contrary to the Seventh Circuit's speculation in Johnson, 1999 WL 675368 at *2, that application of the waiver rule adopted by the court below and a number of other courts of appeals is consistent with the orderly administration of the Social Security program where the claimant is represented in the review process.

The Seventh and Eighth Circuit have had no occasion to consider the Commissioner's new procedures, and those courts therefore have not decided whether a claimant whose representative is actually notified of an obligation to present all contested issues to the Appeals Council may nonetheless raise on judicial review an issue not presented to the agency. It therefore would be premature for this Court to consider that question until the courts of appeals have considered the question presented in light of the change in SSA's procedures.

5. This case is not ripe for this Court's review for another reason as well. Quite aside from the revision of notices to claimant's representatives, the extent to which a claimant must

present an issue to the Appeals Council is a matter that may be conclusively resolved by regulation. See 42 U.S.C. 405(a). In 1994, the Commissioner of Social Security released a study and proposal for a major restructuring of the administrative process for reviewing disability claims. Social Security Admin., U.S. Dept' of Health and Human Services, Pub. No. 01-005, Plan for a New Disability Claim Process (1994), reprinted at 59 Fed. Reg. 47,887 (Sept. 18, 1994). We have been informed by the Social Security Administration that, in April 1997, it began testing models that include several changes to its disability determination procedures. See, e.g., 20 C.F.R. 404.906, 404.943, 416.1406, 416.1443. One change currently being tested is the elimination altogether of requests for review by the Appeals Council. 20 C.F.R. 404.966, 416.1466. Selection of cases for those tests in eleven States began in April 1997, and adjudication under the modified process continues. Because the question presented in this case can be conclusively resolved by regulation, and because the Social Security Administration has the matter under review, we do not believe that review by this Court is warranted at the present time. Cf. Braxton v. United States, 500 U.S. 344, 348-349 (1991); Richardson v. Wright, 405 U.S. 208, 209 (1972) (per curiam).

We have similarly relied on ongoing evaluation of possible changes in the Appeals Council's role or procedures in opposing

certiorari in other cases in which a circuit conflict had arisen on a different legal issue, and the Court has denied certiorari. See Falge v. Apfel, 119 S. Ct. 907 (1999); Roark v. Chater, 519 S. Ct. 1094 (1997); Sullins v. Shalala, 513 U.S. 1076 (1995). The Court should do the same here, especially since SSA in any event has undertaken to address the question in its revised notice in cases involving represented claimants.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1999

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, by Federal Express and first class mail, postage prepaid, on this 15th day of October, 1999.

SEE ATTACHED SERVICE LIST

Seth P Waxman/ks

SETH P. WAXMAN
Solicitor General
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